

The Blurring Line Between Victim and Offender: Self-Produced Child Pornography and the Need for Sentencing Reform

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I. INTRODUCTION

When six teenage girls in Pennsylvania became emboldened and began taking sexually explicit photos of themselves, it seems unlikely that their first thought was child pornography.¹ However, in January 2009, these six teenagers were brought up on child pornography charges—felony offenses that carry significant jail time.² While this is one of the more extreme results of a “sexting” case, self-produced child pornography (SPCP) is an issue that has been receiving increased public attention over the past few years.³

¹ Mike Brunker, ‘Sexting’ Surprise: Teens Face Child Porn Charges, MSNBC.COM (Jan. 15, 2009, 8:03 PM), http://www.msnbc.msn.com/id/28679588/ns/technology_and_science-tech_and_gadgets/.

² *Id.* (stating that the six teenagers were charged under the child pornography statute within the State of Pennsylvania, which punishes production and distribution of child pornography as a felony of the second degree); *see also* 18 PA. CONS. STAT. ANN. § 6312(b) (West 2011). Felonies of the second degree are punishable by “not more than ten years.” *Id.* § 106 (b)(3). The teenagers’ defense attorney, Patrick Artur, captures the sentiment of the situation well, indicating that the “letter of the law seems to have been violated, but this is not the type of defendant that the legislature envisioned” Brunker, *supra* note 1.

³ This is not an isolated incident. For example, in September 2009, eighteen-year-old Isaac Owusu was sentenced to two years in jail and five years of probation by a Vermont court, though he would only serve ninety days of the sentence. *Teen Gets Jail in ‘Sexting’ Case*, WPTZ.COM (Sept. 3, 2009, 7:03 PM), <http://www.wptz.com/t/20705763/detail.htm>. In

No one questions the seriousness of the conduct of these teenagers—their actions are dangerous to them, and a failure to punish this conduct may lead to more serious actions in the future. However, the real question in regard to the issue of punishment is whether, in this case, the punishment that these six teenage girls faced was appropriate.

The current status of the U.S. Sentencing Guidelines as they pertain to child pornography laws are strict and result in strict sentencing for first time offenders.⁴ While the guidelines for sentencing in regards to possession of child pornography are indeed high, this Note will demonstrate that reducing the sentencing for possession is not the answer, as the specific deterrent effect of those Sentencing Guidelines has proven to be effective.⁵ Further, the reduction of these sentencing standards, even for first time offenders, may have negative consequences. However, this mandatory high sentencing should not be a bright line rule: there are circumstances, specifically cases of teen sexting, that need to be distinguished. The goal is to account for differing mentalities, exposure, and the degree of offense. Ultimately, change to the law is needed to account for the meteoric rise of sexting and SPCP in our country: I propose both changes to the statutes regarding child pornography, and parallel changes to the Sentencing Guidelines to account for a new approach to sentencing in this unique area of the law.

Part II will begin with a history of child pornography law, from the original cases to the present day, followed by an overview of current sentencing guidelines for federal child pornography cases (which teenagers would be subject to under the current federal law). Part III will introduce and examine the history and function, as well as the provisions, of the U.S. Sentencing Commission's Sentencing Guidelines. Part IV will discuss whether or not the current federal sentencing scheme is effective, focusing on the federal Sentencing Guidelines' ultimate goals. Part V will seek to discuss a detailed and equitable solution, emphasizing the importance of distinguishing between specific conduct and diversifying the law of SPCP. As part of that discussion, various state approaches will be discussed with an opinion expressed as to the best approach.

that case, Owusu solicited photos that would constitute child pornography from other teenagers. *Id.* Though the circumstances surrounding the sentencing and charges were different, the underlying issue is the same: teenagers being brought up on charges that seem, on their face, much too severe a response to the conduct.

More recently, the subject came up on the pop culture phenomenon *Glee*. In the scene, Noah "Puck" Puckerman (played by Mark Salling) and Lauren Zizes (played by Ashley Fink) were discussing their plans to create a sex tape when they were questioned about the idea by the substitute Sex Education teacher Holly Holliday (played by Gwyneth Paltrow). *Glee: Sexy* (Fox television broadcast Mar. 8, 2011). When their plans were revealed, Holliday informed them that by simply recording themselves engaged in a sexual act, they were guilty of producing child pornography and could be sent to prison. *Id.*

⁴ See U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2011).

⁵ See *infra* Part IV.B.

II. BACKGROUND OF THE LAW

In order to appropriately understand the context in which SPCP finds itself, it is necessary to understand the history behind this area of law. While SPCP is a relatively new phenomenon, it finds its roots in the history of child pornography in general. This section begins with *New York v. Ferber*, the Supreme Court's first attempt at dealing with child pornography and First Amendment issues, and continues through the Court's subsequent attempts at interpreting the doctrine issued in *Ferber* before finally addressing how SPCP fits into this particular area of jurisprudence.⁶

A. *New York v. Ferber*

The first major case regarding child pornography was *New York v. Ferber*,⁷ in which the Supreme Court held that child pornography is not a form of speech protected under the First Amendment.⁸ The case involved the respondent, Mr. Ferber, who engaged in the distribution (via sale) of pornographic materials almost exclusively focusing on young boys masturbating.⁹ The Court cited five major reasons for its holding: the state has a compelling interest in protecting children from sexual abuse;¹⁰ criminalizing child pornography is an effective way to reduce or eliminate the market for child pornography, which renders it necessary for the satisfaction of that compelling interest;¹¹ the distribution of child pornography necessarily requires the sexual abuse of children, therefore making child pornography the direct descendant of physical abuse;¹² child pornography has little or no societal value, to the point that the value is regarded as *de minimis*;¹³ and finally that no case-by-case adjudication is necessary because child pornography, as an entire class of speech, is evil and has so little value to the community.¹⁴

⁶ Though it appears to be tangential, the policies and justifications for the Court's prohibition of child pornography become vitally important in the solution to the SPCP issues. Many of the policy justifications for allowing the criminalization of child pornography do not apply to SPCP, as this Note will demonstrate. However, as this Note has already made clear, these same children are subject to the laws meant for the offenders imagined in *Ferber* and subsequent cases.

⁷ 458 U.S. 747 (1982).

⁸ *Id.* at 765 ("We hold that [the statute criminalizing child pornography] sufficiently describes a category of material the production and distribution of which is not entitled to First Amendment protection.").

⁹ *Id.* at 752.

¹⁰ *Id.* at 756-57.

¹¹ *Id.* at 759.

¹² *Id.* at 762.

¹³ *Ferber*, 458 U.S. at 762.

¹⁴ *Id.* at 763-64. The Court's reasoning, though based in the logic noted, demonstrates a clear disdain for child pornography that is indicative of the public sentiment presented. Justice White, in his majority opinion, specifically notes that it seems "unlikely that visual

B. *Interpreting the Mandate of Ferber*

The Court laid out a strong, decisive opinion in *Ferber*. In many cases, the Court later retreats from that strong of an opinion in favor of a more moderate position.¹⁵ However, in the case of child pornography, the Court maintained a hard line in *Osborne v. Ohio*, holding that sole *possession* of child pornography is not protected by the First Amendment.¹⁶ The Court reasoned that the various factors that served as the basis for the decision in *Ferber* applied in force in cases of possession of child pornography, as well as sale of child pornography, because the images presented constitute records of the actual, physical sexual abuse of children.¹⁷ The Court also noted that there was evidence that indicated pedophiles used child pornography in an attempt to seduce minors, thereby expressing a fear that child pornography may constitute a form of “gateway drug” into actual physical abuse.¹⁸

depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work.” *Id.* at 762–63. Though veiled behind politically correct language and proper terminology, the Court’s opinion of child pornography is rendered here without fail. Justice White’s opinion regarding the material also appears to be shared by the other justices, as the opinion was unanimous, with only concurring opinions presented. *See id.* at 774 (O’Connor, J., concurring); *id.* at 775 (Brennan, J., concurring); *id.* at 777 (Stevens, J., concurring).

¹⁵ *See, e.g., Terry v. Ohio*, 392 U.S. 1, 17–27 (1968). In *Terry*, the Supreme Court carved out a very limited exception to the probable cause requirement by allowing police officers to briefly stop individuals suspected of criminal activity, and, if reasonable suspicion exists, frisk the *outside* of their clothing for weapons. *Id.* at 27. However, the Court later said that conducting “dog sniffs” during a valid traffic stop is permissible under the *Terry* doctrine, substantially swinging away from the strong stance it maintained before. *See Illinois v. Caballes*, 543 U.S. 405, 410 (2004). Another classic example of this pattern of behavior from the Court is its decision regarding the Commerce Clause in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), which held that the Commerce Clause allowed Congress to legislate regarding unfair labor practices. *Id.* at 31. *Jones & Laughlin Steel Corp.* represented a quick retreat from a strong position denying Congress’s power to create such a law just two years prior. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 308 (1936) (“[T]he evils are all local evils over which the federal government has no legislative control.”). The fact that *Carter* and *Jones & Laughlin Steel Corp.* are literal opposites of each other demonstrates the extent to which the Supreme Court will retreat from a strong, decisive position.

¹⁶ 495 U.S. 103, 111 (1990).

¹⁷ *Id.*

¹⁸ *Id.* In the course of its opinion, the Court was forced to distinguish *Osborne* from its holding in *Stanley v. Georgia*, 394 U.S. 557 (1969), which held that mere possession of obscene material could not constitutionally be made a crime. *Id.* at 568. The Court handled the opinion quickly, indicating that the rationales of *Ferber* apply because the possession of child pornography is necessary for child pornography to be a successful industry and permeate throughout society. *Osborne*, 495 U.S. at 110. Though individuals could keep records of their sexual abuse of children, this would simply be an additional charge and a record of child sex abuse that could subsequently be used as evidence. *See id.* at 111. Thus,

The most recent major opinion regarding child pornography is *Ashcroft v. Free Speech Coalition*,¹⁹ in which the Court held that the production and distribution of “virtual” child pornography is protected under the First Amendment and cannot be criminalized.²⁰ Based on the *Ferber* standard, this opinion makes perfect sense given that there is no direct child sexual abuse records involved.²¹ Thus, many of the rationales that applied in force in *Ferber* and *Osborne* are rendered impotent as reasoning for the exclusion of virtual child pornography. The Court also maintains a level of skepticism regarding the concept that virtual child pornography will act as a “gateway drug” to illegal activities, and implicitly maintains that actual child pornography will as well.²²

The Court’s opinion in *Free Speech Coalition* set the outer boundaries of the prohibition on child pornography,²³ and established the battleground between the conflicting interests of the First Amendment and the government’s interest in protecting children. However, that line was immediately challenged by the recent arrival of the explosive phenomenon of sexting and SPCP.

C. Enter the Problem of “Sexting” and Self-Produced Child Pornography

Recently, the issue of “sexting” among minors has become quite significant.²⁴ Sexting in general is a misnomer, as the term applies to both sexual images as well as sexual conversations between minors.²⁵ Since sexual conversations are not prohibited under the current law as interpreted by the

the Court reasoned, the real benefit of production of child pornography is either commercial or the “numbing” effect on the consumer. *Id.* at n.7. Hence, it is important to criminalize possession—at least one aspect of the “industry” would be impacted. *Id.* at 110.

¹⁹ 535 U.S. 234 (2002).

²⁰ *Id.* at 256. “Virtual” child pornography constitutes pornography that has been digitally altered in some way to make an adult actor appear to be a child or uses adults who appear to be children. *Id.* at 241.

²¹ *Id.* at 249.

²² *Id.* at 253. For an excellent discussion of the development of child pornography laws, see generally Jesse P. Basbaum, Note, *Inequitable Sentencing for Possession of Child Pornography: A Failure to Distinguish Voyeurs from Pederasts*, 61 HASTINGS L.J. 1281 (2010).

²³ The outer boundaries are as bright as possible: if children are involved, you fall under the *Ferber* standard. If children are not involved, but the depictions resemble children, then you fall under the *Free Speech Coalition* standard. See *Free Speech Coal.*, 535 U.S. at 249.

²⁴ See, e.g., *Sex and Tech: Results from a Survey of Teens and Young Adults*, NAT’L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, 1–4 (2008), http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf [hereinafter *Sex and Tech*] (providing statistics regarding the presence of sexting in today’s society).

²⁵ Marsha Levick & Kristina Moon, *Prosecuting Sexting as Child Pornography: A Critique*, 44 VAL. U. L. REV. 1035, 1035 (2010).

Supreme Court,²⁶ the correct term as it relates to minors is “Self-Produced Child Pornography” (SPCP).²⁷ SPCP is covered under the same definitions of child pornography as that produced by third parties.²⁸ Thus, in order for something to be appropriately deemed SPCP, it must “meet the legal definition of child pornography and [be] originally produced by a minor with no coercion, grooming, or adult participation whatsoever.”²⁹ Further, the fact that SPCP offenders are governed by the same set of laws as third-party child pornography offenders means that the issues and problems surrounding enforcement and sentencing as to third-party child pornography offenders are the same issues that apply to individuals who engage in SPCP. Therefore, analysis of the success of sentencing as to third-party offenders is relevant to a determination of how SPCP sentencing should be handled.³⁰

III. AN OVERVIEW OF THE SENTENCING GUIDELINES FOR CHILD PORNOGRAPHY OFFENSES

Prior to the Sentencing Reform Act of 1984 (SRA),³¹ sentencing was largely based on the discretion of the judges.³² However, the SRA created the

²⁶ “[T]he distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection.” *Free Speech Coal.*, 535 U.S. at 251 (quoting *New York v. Ferber*, 458 U.S. 747, 764–65 (1982)).

²⁷ Mary G. Leary, *Sexting or Self-Produced Child Pornography? The Dialogue Continues—Structured Prosecutorial Discretion Within a Multidisciplinary Response*, 17 VA. J. SOC. POL’Y & L. 486, 491 (2010).

²⁸ *Id.* But see 2010 Legislation Related to “Sexting,” NAT’L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/?tabid=19696> (last updated Jan. 4, 2011).

²⁹ Leary, *supra* note 27.

³⁰ When discussing SPCP, it is important to note that SPCP is produced for a variety of reasons: sometimes for individuals whom the minor wishes to sexually seduce or otherwise engage with romantically. In some rare cases, the minor’s SPCP is displayed to total strangers and/or posted on the Internet like any other form of child pornography. Mary G. Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL’Y & L. 1, 4–5 (2007). Emphasis should be placed on the “rare” part of those latter cases—in most cases, we are simply dealing with teenagers whose hormones and romantic desires, combined with their own naïve notions of what is appropriate, lead to an unfortunate conclusion. The scope of this inquiry will focus on the issues surrounding federal and state sentencing for child pornography in general, as well as the implications and dangers of sentencing for child pornography in general. However, it is always important to remember that the key issue in this Note is how these factors should influence a sentencing change for individuals who engage in SPCP.

³¹ Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.). At this point, it is important to note that discussion of the actual federal child pornography statute, 18 U.S.C. § 2252 (2006), will not occur until Part V. The statute itself is helpful in the sense that we need to make the necessary changes to it, as well as the guidelines, for the effects of this venture to be mandatory. However, my major focus in this Note is to address the sentencing aspect, not as much the crime itself. Because of this focus, the Sentencing Guidelines serve as a more effective medium through which the

United States Sentencing Commission (USSC), which was tasked with creating a uniform sentencing approach.³³ The USSC responded by creating a scientific approach to sentencing: a grid, which involved forty-three offense levels and six criminal history levels resulting in the placement of criminal defendants into a particular “square” on the grid.³⁴ Each square has its own sentencing recommendation, which is measured in months.³⁵ Thus, the ultimate result is that a defendant is placed in one of the grid’s squares based on the offense. The severity of the punishment was based on the criminal history of the defendant, which was based on the number of prior convictions the defendant had.³⁶

Initially, the SRA made the sentencing recommendations mandatory for judges, thereby nearly eliminating judicial discretion in sentencing and creating uniformity in sentencing for individuals charged under the same criminal statute.³⁷ However, the Court struck down this mandatory sentencing requirement in *United States v. Booker*, declaring that mandatory sentencing violated the defendant’s Sixth Amendment right to a jury trial.³⁸ The Court did not eliminate the sentencing requirements of the USSC entirely, but rather made the sentencing “requirements” merely sentencing “guidelines” which were to be advisory.³⁹

Despite the fact that the current sentencing requirements are advisory rather than mandatory, they maintain an important position in the sentencing scheme.⁴⁰ Thus, as with the history of the case law regarding child

situation regarding SPCP offenders can be understood. Of course, any major changes to the Sentencing Guidelines addressed in Part V should be considered for a mandatory status within the proposed *new* statute.

³² See, e.g., *United States v. Tucker*, 404 U.S. 443, 446 (1972).

³³ See 18 U.S.C. § 3553(a)–(c) (2006).

³⁴ U.S. SENTENCING GUIDELINES MANUAL § 5A (2011); Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1324–25 (2005).

³⁵ U.S. SENTENCING GUIDELINES MANUAL § 5A.

³⁶ Criminal History Category I is reserved for individuals who achieve 0–1 points on this scale: under USSG § 4A, this means that the individual either has (1) no prior criminal record, (2) has been imprisoned for a *total* of less than sixty days, or (3) received a sentence for a crime of violence that did not result in incarceration. *Id.* § 4A1.1.

³⁷ See 18 U.S.C. § 3553(a)–(c).

³⁸ 543 U.S. 220, 245 (2005). The Court based its decision on the precedent set by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which required prosecutors to prove facts that exceed the Sentencing Guidelines beyond a reasonable doubt. *Id.* at 477.

³⁹ *Booker*, 543 U.S. at 245–46. In refusing to completely wipe out the SRA, Justice Breyer noted that the Sentencing Guidelines do “not consist simply of similar sentences for those convicted of violations of the same statute—a uniformity consistent with the dissenters’ remedial approach. It consists, more importantly, of similar relationships between sentences and real conduct, relationships that Congress’ sentencing statutes helped to advance.” *Id.* at 253–54.

⁴⁰ Gilles R. Bissonnette, Comment, “Consulting” the Federal Sentencing Guidelines After *Booker*, 53 UCLA L. REV. 1497, 1534–35 (2006). Bissonnette notes that “*Booker* made

pornography, an understanding of how the current Sentencing Guidelines for child pornography offenders came into being is vital for an understanding of how the law needs to change. This section begins with a brief discussion of how the current Sentencing Guidelines came into being, and then proceeds with an example to illustrate exactly how disproportionate the recommended sentencing of minors guilty of SPCP can be.

A. Sections 2G2.1–.2 and the Development of the Sentencing Guidelines for Child Pornography Offenders

The current Sentencing Guidelines that apply to SPCP possession are sections 2G2.1–.2,⁴¹ which are also the general guidelines that cover child pornography offenses.⁴² The development of these guidelines finds its roots in a long series of congressional acts geared at enhancing penalties for child pornography possession, production, and distribution.⁴³ After the promulgation of sections 2G2.1–.2 in 1987, which coincides with the creation of the USSC, the push for more severe penalties continued.⁴⁴ At the beginning of the Sentencing Guidelines, child pornography possession received a meager rating of thirteen, with only the prepubescent character of the minor leading to an enhancement of the sentence.⁴⁵ Under the current Sentencing Guidelines, this means that the recommended sentence for possession of child pornography at that time would have been twelve to eighteen months for offenders who fall into

clear that the Guidelines are alive and well and that they must play a role (whatever that role may be) in federal sentencing.” *Id.*

⁴¹ At this point, it is important to note that section 2G2.2 deals with *possession* of child pornography. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2. For the Sentencing Guidelines regarding distribution or production of child pornography, see *id.* § 2G2.1. The base offense level for section 2G2.1 is thirty-two: therefore, the recommended sentence for first-time offenders who fall under section 2G2.1 is 121 to 151 months (roughly ten to twelve years). *Id.* § 5A.

⁴² *Id.* § 2G2.2.

⁴³ Even before the guidelines came into being in 1987, Congress had made repeated attempts to increase the penalties for child pornography. *See, e.g.*, Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, sec. 2(a), 92 Stat. 7, 8 (1978) (codified as amended at 18 U.S.C. § 2251 (2006)) (providing a mandatory minimum of two years imprisonment for repeat offenders and a ten-year maximum for first-time offenders); Child Protection Act of 1984, Pub. L. No. 98-292, § 4, 98 Stat. 204, 204–05 (codified as amended at 18 U.S.C. § 2252 (2006)) (extending penalties to child pornography producers who were not commercially involved); *see also* Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, 100 Stat. 3510; Child Abuse Victims’ Rights Act of 1986, Pub. L. 99-500, 100 Stat. 1783.

⁴⁴ U.S. SENTENCING COMM’N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 10 (2009) (“Two specific offense characteristics were provided in §2G2.2: a [two]-level increase when an image depicted a child under twelve years of age; and no less than a [five]-level increase for distribution with additional increases keyed to the retail value of the material distributed, rather than the number of images or reason for distribution.”).

⁴⁵ *Id.* at 11.

Criminal History Category I.⁴⁶ However, in 1990, the sentencing commission instituted a staff report that indicated the penalties were too lenient to be in accord with congressional intent,⁴⁷ and advised several enhancements.⁴⁸ The USSC responded, instituting major changes for the first time since the promulgation of the guidelines in 1987. Included were enhancements regarding patterns, sadistic conduct, and an expansion of the categorical sentence enhancement surrounding age.⁴⁹ In 1991, just one year after these major changes took place, the USSC raised the base offense level on the sentencing grid from thirteen to fifteen, thereby attempting to increase the severity of the offenses while maintaining the sentence enhancements promulgated in 1990.⁵⁰ Under the current USSC sentencing table, therefore, the base offense level increase creates a six-month increase in sentence, from twelve to eighteen months to eighteen to twenty-four months recommended for offenders in Criminal History Category I.⁵¹

From this point on, the rise continued at breakneck pace: the USSC raised the base offense level to seventeen in 1996⁵² and then raised it again to twenty-two in 2004.⁵³ The USSC also significantly increased penalties in response to reports for the commercial distribution of child pornography in 2000.⁵⁴ Today, section 2G2.2 remains at base offense level twenty-two, which without enhancement recommends a sentence of forty-one to fifty-one months.⁵⁵

⁴⁶ U.S. SENTENCING GUIDELINES MANUAL § 5A. I used the 2011 version rather than the 1987 version of the sentencing table to demonstrate the change on a neutral platform. It is worth noting that I am not using the tables for the time periods that I am dealing with, and therefore the sentences may well have been different at those times. However, in order to most effectively demonstrate the rise in sentencing for child pornography offenders, I choose to show the rise on one table, rather than multiple tables. In the Sentencing Guidelines' table within § 5A, there are multiple offense levels and six criminal history categories. *Id.* The criminal history categories are meant to account for various levels of criminal past, with various factors being assigned "points" that determine the appropriate category one falls into. For applicable details, see *id.* § 4A1.1.

⁴⁷ See *supra* note 43 for examples of congressional laws passed prior to the staff report.

⁴⁸ U.S. SENTENCING COMM'N, *supra* note 44, at 14.

⁴⁹ *Id.* at 15.

⁵⁰ *Id.* at 25.

⁵¹ U.S. SENTENCING GUIDELINES MANUAL § 5A.

⁵² U.S. SENTENCING COMM'N, *supra* note 44, at 32.

⁵³ *Id.* at 49. There is a caveat to the increase to offense level twenty-two: if the defendant is convicted under certain statutes, then the base offense level is only eighteen. *Id.* Those statutes consist of 18 U.S.C. §§ 1466A(b), 2252(a)(4), 2252A(a)(5), and 2252A(a)(7). 18 U.S.C. § 1466A(b) revolves around what would constitute cartoon child pornography, 18 U.S.C. § 1466A(b) (2006), an interesting indicator of offense given the Court's major issues regarding child pornography are, in large part, related to the actual sexual abuse of children. See *New York v. Ferber*, 458 U.S. 747, 762 (1982).

⁵⁴ U.S. SENTENCING COMM'N, *supra* note 44, at 36.

⁵⁵ U.S. SENTENCING GUIDELINES MANUAL § 5A. Of course, if the individual is found guilty under one of the specified statutes in § 2G2.2(a), then the base offense level is eighteen, which requires twenty-seven to thirty-three months. *Id.*

However, in addition to this base offense sentence, the sentencing is enhanced by numerous factors, including materials involving prepubescent children,⁵⁶ materials depicting sadistic or masochistic conduct,⁵⁷ a demonstrated “pattern” of sexual misconduct with minors,⁵⁸ whether the offense involved the use of a computer,⁵⁹ and finally whether or not the offense involved the distribution of child pornography for pecuniary gain or to entice children into illegal sexual acts.⁶⁰

B. *Hypothetical Example of the Application of Section 2G2.2 in a SPCP Case*

It is clear that the combination of enhancements and repeatedly increasing base numbers indicates the public disgust toward child pornography and increased attempts at both deterrence and the protection of the public. Over time, the public has become more fearful of child pornography,⁶¹ and the seriousness of the offense has continued to rise.⁶² However, it is doubtful that the legislature or public had SPCP in mind when they were considering child pornography⁶³; rather, it is likely that the public and the legislature envisioned a morally bankrupt, evil man in a basement forcing children to have sex or pose sexually for erotic or commercial gain.⁶⁴ When child pornography is viewed in this light, it is difficult to imagine anyone disagreeing with heightened penalties, given the pain that such crimes would inflict on their victims.⁶⁵ Equally

⁵⁶ *Id.* § 2G2.2(b)(2).

⁵⁷ *Id.* § 2G2.2(b)(4).

⁵⁸ *Id.* § 2G2.2(b)(5). A pattern, based on its plain language, is likely going to require a prior criminal record of child exploitation or other sexual contact with children. The statute itself does not indicate with any specificity what is required beyond a “record” to trigger this enhancement. *Id.*

⁵⁹ *Id.* § 2G2.2(b)(6).

⁶⁰ *Id.* § 2G2.2(b)(3)(A)–(F).

⁶¹ See, e.g., Basbaum, *supra* note 22, at 1292–93.

⁶² See U.S. SENTENCING COMM’N, *supra* note 44, at 11, 15, 25, 32, 36, 49.

⁶³ See 2010 Legislation Related to Sexting, *supra* note 28. The legislative response to SPCP is indicative of the public reaction, as many states seek to alter their criminal statutes to account for this difference. *Id.*

⁶⁴ See, e.g., Aaron Sanborn, *Child-Porn Producer Sentenced to 60 Years*, SEACOASTONLINE.COM (Jan. 14, 2011, 2:00 AM), <http://www.seacoastonline.com/articles/20110114-NEWS-101140393> (detailing the sentencing of a forty-seven-year-old man who produced pornographic videos and pictures of pre-pubescent children and toddlers in his New Hampshire home).

⁶⁵ For an interesting review of these effects, see P.E. Mullen et al., *The Long-Term Impact of the Physical, Emotional, and Sexual Abuse of Children: A Community Study*, 20 CHILD ABUSE & NEGLECT 7, 7 (1996). Mullen notes that there is a “trend for sexual abuse to be particularly associated to sexual problems, emotional abuse to low self-esteem, and physical abuse to marital breakdown.” *Id.*; see also Kathleen A. Kendall-Tackett, Linda Meyer Williams & David Finkelhor, *Impact of Sexual Abuse on Children: A Review and*

disturbing is the concept of an older man sitting at his computer, gaining erotic benefits from the suffering of victims. However, what the public likely did not envision was a teenage girl, who was trying to get the attention of a crush, foolishly violating the child pornography laws in an attempt to seduce the minor teenage boy into a relationship.⁶⁶ The outrage and campaign against the first two examples of child pornography law offenders will be waged equally against a young girl due to a lack of appropriate distinction between offenders. The following examples will demonstrate the absurd and morally wrong results of teens who are charged under sections 2G2.1–.2.

The example is simple: Adam, a sixteen-year-old boy who recently moved to Michigan, takes a picture of his genitals and sends it through e-mail to his fifteen-year-old girlfriend Betsy, who lives in Ohio. Adam's motivation was personal in nature—he wanted Betsy to come and visit him on the weekend, and thought that a sexual advance might accomplish that goal. Betsy's father finds the picture and reports Adam to the police. Since Adam is under the age of eighteen, he is in violation of the federal child pornography laws.⁶⁷ Under the current federal Sentencing Guidelines, Adam is immediately facing a base offense level of thirty-two.⁶⁸ However, this base offense level does not take into account the sentencing enhancements that apply to this case. Adam used e-mail; therefore, distribution was involved, bumping Adam's offense level to thirty-four.⁶⁹ Because of this, Adam is looking at a recommended sentence of 151 to 188 months, or roughly ten to twelve years, assuming he falls into Criminal History Category I.⁷⁰

As for Betsy, she is technically guilty of possession of child pornography, an offense governed by USSG section 2G2.2.⁷¹ This puts Betsy at an offense level of twenty-two.⁷² However, Betsy also used a computer in the receipt of the SPCP; therefore, her offense level is bumped up by two levels.⁷³ Because of this, Betsy is facing a minimum recommended sentence of fifty-one to sixty-three months, or roughly five years.⁷⁴

Synthesis of Recent Empirical Studies, in CHILDREN AND THE LAW: THE ESSENTIAL READINGS 31, 33 (Ray Bull ed., 2001).

⁶⁶ See Brunker, *supra* note 1.

⁶⁷ These examples assume that the offenders are charged as adults under the federal child pornography laws and reflect only the sentencing recommendations. If Adam is charged under the federal child pornography law, he is facing a minimum of five years. See 18 U.S.C. § 2252(b)(1) (2006).

⁶⁸ This is because Adam is technically guilty of distribution, or sexual exploitation of a minor, which is covered in the Sentencing Guidelines under U.S. SENTENCING GUIDELINES MANUAL § 2G2.1 (2011).

⁶⁹ This comes from *id.* § 2G2.1(b)(3), which requires this sentence enhancement.

⁷⁰ *Id.* § 5A. For an explanation of how to qualify for the various categories presented in the guidelines, see *id.* § 4A1.1.

⁷¹ See *id.* § 2G2.2.

⁷² See *id.* § 2G2.2(a)(2).

⁷³ See *id.* § 2G2.2(b)(6).

⁷⁴ U.S. SENTENCING GUIDELINES MANUAL § 5A.

While it is uncertain whether such sentences will apply, given the nature of the offense and the types of situations involved, what is important is that such a sentence *could* arise simply on the basis of the recommendations of the USSC. Much is left to the discretion of the judiciary and the views of society, either of which may change regarding these issues.⁷⁵ Therefore, it is important to determine the likely effectiveness of this type of sentencing, as well as promulgate the distinctions necessary to prevent what is more than likely an excessive potential sentence.

IV. IS THE CURRENT SENTENCING SCHEME EFFECTIVE?

Before launching into a demand for distinctions and separate sentencing guidelines, it is important to determine whether the current sentencing scheme⁷⁶ effectively meets society's goals in sentencing. Many states are in the middle of debates regarding legislation geared toward criminalizing SPCP,⁷⁷ while others are inflicting relatively lenient sentences.⁷⁸ Overall, the determinations

⁷⁵ Fear of such a shift is not unreasonable. The Supreme Court's decision in *Kent v. United States*, 383 U.S. 541 (1966), allowed juveniles to be tried as adults, which means that courts may allow teenagers to be subjected to very severe penalties. *Id.* at 552. The Court in *Kent* announced specific limitations on this possibility, requiring the juvenile court to weigh various factors, including the "seriousness of the alleged offense," whether the alleged offense was a violent or aggressive one, "[w]hether the alleged offense was against persons or against property," and the "sophistication and maturity of the juvenile," among other factors, before waiving their jurisdiction. *Id.* at 566–67. Further, any notion that this response is limited to murder should be quickly dispelled; Kent himself was charged with housebreaking, robbery, and rape. *Id.* at 544. Since the *Kent* case, courts have been trying teens as adults for crimes less brutal than rape and murder. *See, e.g.,* Gina Gallucci-White, *Teen Charged as Adult in Robbery*, FREDERICK NEWS POST (Oct. 29, 2010), http://www.fredericknewspost.com/sections/archives/display_detail.htm?StoryID=117622 (charging a sixteen-year-old boy as an adult for robbery); Violet Petran, *When Kids Commit Adult Offenses*, LEGALMATCH: L. BLOG (Mar. 17, 2010), <http://lawblog.legalmatch.com/2010/03/17/when-kids-commit-adult-offenses/> (citing how a fourteen-year-old can be charged as an adult for armed robbery in California).

⁷⁶ When I refer to the current sentencing scheme, for the purposes of SPCP, I am referring not only to USSG § 2G2.2, but also to the statutory sentencing requirements as imposed by 18 U.S.C. § 2552. This is because one of the major goals of this Note is to *legally* prevent judges from imposing severe penalties on SPCP offenders, not to simply make a *moral* argument.

⁷⁷ *See* 2010 Legislation Related to Sexting, *supra* note 28.

⁷⁸ Douglas A. Berman, "Sexting or Self-Produced Child Pornography?," SENT'G L. & POL'Y BLOG (Sept. 22, 2010, 8:02 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2010/09/sexting-or-self-produced-child-pornography.html (quoting Mary Leary, Abstract, *Sexting or Self-Produced Child Pornography? The Dialogue Continues—Structured Prosecutorial Discretion Within a Multidisciplinary Response*, SOC. SCI. RES. NETWORK (Aug. 11, 2010), <http://ssrn.com/abstract=1657007>). For example, an Ohio court determined that thirty days of house arrest for the boy involved, and a paper regarding sexting for the girl involved, constituted an appropriate deterrence to SPCP in that case. Douglas A. Berman, "Ohio Judge Sentences 2 Teens for Sexting," SENT'G L. & POL'Y BLOG

regarding the effectiveness of SPCP sentencing must revolve around the few statistics we have,⁷⁹ as well as the common views of society. Discussion regarding the deterrent value of these sentencing guidelines on child pornographers in general is also warranted; arguably, if the sentencing scheme is ineffective as to these “more serious” offenders, then it will be equally ineffective with these lesser offenders.

According to federal statutes, the goals in federal sentencing are for the sentence “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment.”⁸⁰ Other important goals are for the sentence to “afford adequate deterrence” against the type of conduct in question⁸¹ and to “protect the public from further crimes of the defendant.”⁸² Finally, the sentence must “provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”⁸³ With these factors in mind, Part IV proceeds by discussing, in order: (1) whether the current scheme provides just punishment; (2) whether the current sentencing scheme provides effective deterrence; (3) whether the current sentencing scheme *really* protects the public in the most effective way, and finally; (4) whether this sentencing scheme provides the punished with what they need to successfully reintegrate into society, which includes a brief discussion of sex offender registration and its potential impact on SPCP offenders.

A. *Seriousness of the Offense, Just Punishment, and Respect for the Law*

It is clear that the severe penalties demonstrate the seriousness of the offense in question.⁸⁴ For the moment, both Congress and the USSC are both convinced that this is a very serious offense. This may be in light of the “moral panic,” referred to by commentators, that surrounds child pornography in today’s society.⁸⁵ However, there is no real argument here: the seriousness of the offense is well-established.

(May 12, 2009, 4:08 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2009/05/ohio-judge-sentences-2-teens-for-sexting.html (citing Donna Willis, ‘*Sexting*’ Teens Must Surrender Phones, NBC4i.COM (May 12, 2009), www2.nbc4i.com/news/2009/may/12/sexting_teens_must_surrender_phones-ar-13382/).

⁷⁹ See, e.g., *Sex and Tech*, *supra* note 24. This survey demonstrates that sexting has become a part of our society. *Id.*

⁸⁰ 18 U.S.C. § 3553(a)(2)(A) (2006).

⁸¹ *Id.* § 3553(a)(2)(B).

⁸² *Id.* § 3553(a)(2)(C).

⁸³ *Id.* § 3553(a)(2)(D).

⁸⁴ Discussion of the offense in general, as well as its impact, is addressed well in Audrey Rogers, *Child Pornography’s Forgotten Victims*, 28 PACE L. REV. 847, 847–63 (2008).

⁸⁵ See also Basbaum, *supra* note 22, at 1292. See generally Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 STAN. L. & POL’Y REV. 545 (2011).

Equally well-established is the issue of whether the sentencing scheme promotes respect for the law. Though respect for the law may not be the actual result,⁸⁶ it is difficult to imagine a method via legislation more intended to promote respect for the law than the increased penalties associated with it.⁸⁷ The only other real method available for promoting respect for the law would be effective enforcement⁸⁸ and convincing individuals that they will be caught.⁸⁹

Therefore, the major issue in this section is whether the current sentencing scheme provides “just punishment” for the offense and achieves the “respect for the law” it promotes.⁹⁰ This particular issue is one of the core distinctions between child pornography in general and SPCP in particular.⁹¹ As to child pornography in general, just punishment has been a hot issue amongst commentators.⁹² Many commentators believe that the Sentencing Guidelines are ineffective and call for changes regarding the way sentencing is carried out now.⁹³ Again, it must be stressed that this is in regards to child pornographers who victimize *others*, not themselves. Further, many judges are in full rebellion against the Sentencing Guidelines, consistently coming in short of the

⁸⁶ See *infra* Part IV.B.

⁸⁷ The goals of sentencing themselves illustrate this point—Congress imposes the punishments (or brackets of punishments), in part, to “promote respect for the law.” 18 U.S.C. § 3553(a)(2)(A). Further, many of the goals of sentencing gleaned by scholars revolve around promoting respect for the law, and therefore not violating it. See, e.g., Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 70 (2005) (“[S]entencing principles focus on using criminal penalties to prevent or lessen the seriousness of future criminal acts by the offender being sentenced and/or by other, would-be offenders. Criminal penalties have the potential to achieve these crime-control effects through at least five causal mechanisms: *rehabilitation, incapacitation, specific deterrence, general deterrence, and denunciation.*”).

⁸⁸ Isaac Ehrlich, *The Deterrent Effect of Criminal Law Enforcement*, 1 J. LEGAL STUD. 259, 259–60 (1972) (“The idea that law enforcement—the apprehension and punishment of law breakers—serves partly as a means of deterring future crimes . . . is basic to crime control legislation [T]his article presents extensive empirical evidence . . . that law enforcement does deter the commission of crimes.”).

⁸⁹ *Id.* at 260 (“[L]aw enforcement . . . must surely have some preventive effect . . .”). The effect of efficient law enforcement is that criminals believe that they will be caught if they engage in such behavior, thereby creating the *preventive effect* Ehrlich addresses.

⁹⁰ See Ehrlich, *supra* note 88, at 260; Frase, *supra* note 87, at 80.

⁹¹ See, e.g., Leary, *supra* note 30, at 4–5. Leary discusses the effects of child pornography on the victims themselves as well as the effects on society as a whole. *Id.* at 9–18. However, it is the very status of SPCP producers as “victims” under the child pornography statutes that creates the interesting dichotomy that results in legal blowout. The core issue is whether or not it is just to punish offenders who victimize *themselves* to the degree of offenders who victimize *others*.

⁹² To name a few participants, see generally Jelani Jefferson Exum, *Making the Punishment Fit the (Computer) Crime: Rebooting Notions of Possession for the Federal Sentencing of Child Pornography Offenses*, 16 RICH. J.L. & TECH. 8, (2010); Leary, *supra* note 30; Rogers, *supra* note 84.

⁹³ See, e.g., Exum, *supra* note 92, ¶ 1.

recommended sentences.⁹⁴ Still, other commentators are concerned that the child pornography laws lose sight of the victims in question—the children in the images that are dealt for both commercial and simple erotic gain.⁹⁵

Ultimately, the issue with regard to SPCP is whether it can be considered “just” to punish SPCP offenders in the same way as third-party offenders. As the Supreme Court noted in *Ferber*, the focus of the laws against child pornography is to prevent the victimization of children for erotic or commercial gain.⁹⁶ The reasoning behind this is clear: we want to prevent children from becoming damaged psychologically or physically by actual sexual abuse.⁹⁷ However, this rationale, and therefore the likely basis for extreme punishment in the public’s eyes, falls well short in cases of SPCP. To begin, these children are not being subjected involuntarily or voluntarily to sexual abuse by a third party; instead, they are exposing themselves to the camera on their own terms and, therefore, violating the law.⁹⁸ This type of self-exposure does not ring consistent with the psychological and physical trauma associated with the production, and subsequent enjoyment, of child pornography.⁹⁹

The large majority of cases involving SPCP include what is commonly known as sexting between two minors, which involves either no third-party solicitation or solicitation by another minor.¹⁰⁰ Given that the effects of SPCP are likely much less severe than the imposition of sexual acts on minors for the purpose of producing child pornography by a third party, it follows that the “just punishment” for this societal and personal “wrong” should also be less severe.¹⁰¹ However, the current federal sentencing scheme, should an SPCP

⁹⁴ *Id.*

⁹⁵ See Rogers, *supra* note 84, at 848 (“The goal of this paper is to demonstrate that possession of child pornography is not a victimless crime. It will illustrate the problem and explain the harm suffered by its victims. It will then trace factors that may have contributed to the perception that possession of child pornography is a victimless offense.” (footnote omitted)).

⁹⁶ *New York v. Ferber*, 458 U.S. 747, 762 (1982).

⁹⁷ *Id.* at 757 (“[W]e have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.”).

⁹⁸ See *Sex and Tech*, *supra* note 24, at 2 (“71% of teen girls and 67% of teen guys who have sent or posted sexually suggestive content say they have sent/posted this content to a boyfriend/girlfriend.”).

⁹⁹ Ultimately, these children are not being forced to engage in any of these activities nor are they being sexually assaulted by another individual. As the Supreme Court noted in *Ferber*, one of the key components in the illegality of child pornography is the damage it does to the individuals who are *subjected* to it. *Ferber*, 458 U.S. at 756–57. The lack of the underlying child sex abuse, and the common sense problems associated with it, are notably absent in cases of SPCP. In some cases, it is arguable that the child was solicited to produce SPCP by a mature adult; however, this is an issue that will be discussed in Part IV of this Note.

¹⁰⁰ *Sex and Tech*, *supra* note 24, at 1–4.

¹⁰¹ It is worth noting that there are many variables involved in this loaded statement. Those variables will be discussed in Part V of this Note.

offender be legitimately brought up on child pornography charges, provides the same punishment for both offenders. Therefore, the current federal sentencing scheme fails to meet this goal in sentencing—the punishment associated with SPCP is not “just.”

B. *The Deterrent Effect of the Current Sentencing Scheme*

Deterrence is generally broken down into two separate factors: specific deterrence and general deterrence.¹⁰² Specific deterrence is a determination as to whether or not the individual who has been charged and sentenced under the sentencing scheme will repeat the offense with which he was originally charged with.¹⁰³ General deterrence, on the other hand, is a determination as to whether the current sentencing scheme is effective in preventing individuals from violating the law to begin with.¹⁰⁴ Deterrence itself is a difficult thing to measure.¹⁰⁵ The best information we have is recidivism rates and the number of child pornography and SPCP offense cases that come around each year.¹⁰⁶ Recidivism rates are nearly impossible to obtain regarding minors because of the heavy focus on recidivism rates of adult sex offenders.¹⁰⁷ Due to these data issues, the focus of this Note is on the general deterrent effect of the current sentencing scheme, both in regards to child pornography in general as well as SPCP in particular.

¹⁰² See Thomas B. Colby, *Clearing the Smoke from Phillip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 470 (2008).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See Michelle L. Meloy, *The Sex Offender Next Door: An Analysis of Recidivism, Risk Factors, and Deterrence of Sex Offenders on Probation*, 16 CRIM. JUST. POL'Y REV. 211, 212 (2005). Meloy notes that recidivism, and therefore specific deterrence, is “difficult to determine . . . because of the complications involved in how recidivism is measured, defined, and explored.” *Id.* Meloy also notes that another complication is the wide variety of sex offenders and the various rates of recidivism associated with them. *Id.*; cf. Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 231–32 (2001) (discussing the wide variety of child pornography statistics, ranging from individuals who claim that child pornography is a five billion dollar a year industry to those who say that “[c]ommercial child pornography does not exist in this country”).

¹⁰⁶ See, e.g., Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1108 (2001) (noting that “recidivism is the quintessential sentencing factor”). Thus, if recidivism rates remain high, despite increased penalties, it becomes clear that the sentencing is ineffective (at least in terms of specific deterrence). As for general deterrence, crime rates are a good teller: those who are aware of the penalties, and still commit the crimes (subject to some exceptions detailed *infra* Part IV.B.1), indicate that the penalties themselves are not effectively deterring the public from engaging in that particular crime.

¹⁰⁷ See generally Michael C. Seto & Angela W. Eke, *The Criminal Histories and Later Offending of Child Pornography Offenders*, 17 SEXUAL ABUSE: J. RES. & TREATMENT 201 (2005).

1. General Deterrence of Third-Party Child Pornography Offenders

Despite draconian penalties, it appears that the general deterrence of potential child pornography offenders has not been particularly successful. From 1994 to 2006, the percentage of child pornography cases in federal courts (as opposed to sex trafficking and sexual abuse) accounted for 82% of the sexual exploitation crime growth.¹⁰⁸ Further, child pornography offenses also grew from 21% of the total sex offenses in federal courts in 1994 to 69% in 2006.¹⁰⁹ However, it is also worth noting that sex offenses in general (comprised of child abuse, sex trafficking, and child pornography) constituted a very small piece of the pie of federal prosecutions in 2006.¹¹⁰ Thus, while child pornography is a large piece of the sex offender pie, sexual offenses as a whole seem to be a relatively minute occurrence, though still very significant.¹¹¹ This may indicate some sort of general deterrence due to the severity of the laws.

Ultimately, this indicates an interesting dichotomy: on the one hand, sex offenses are the fewest among federal prosecutions; on the other hand, child pornography continues its skyrocketing offense rate despite, and in fact in defiance of, consistently raised penalties for possession.¹¹² This rise in child pornography cases could potentially be attributed to a failure in deterrence through sentencing and may indicate that an *increase* in the sentencing of third-party child pornographers may be appropriate.¹¹³

However, a sentence on its own is worthless without a guarantee (or at least a more effective demonstration) that the individuals will be caught.¹¹⁴ Therefore, one potential solution regarding the issue of deterrence is increased funding for cybercrime divisions such as the Child Exploitation and Obscenity

¹⁰⁸ MARK MOTIVANS & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROSECUTION OF CHILD SEX EXPLOITATION OFFENDERS, 2006, at 1 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fpcseo06.pdf>.

¹⁰⁹ *Id.*

¹¹⁰ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2006—STATISTICAL TABLES NCJ 225711, available at <http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2006/fjs06st.pdf>. The Department of Justice designates statistically that less than one percent of suspects arrested and booked were sexual offenders, whether violent or non-violent. *Id.*

¹¹¹ *See id.*

¹¹² *See* MOTIVANS & KYCKELHAHN, *supra* note 108, at 1.

¹¹³ However, an increase in sentencing may also be inappropriate. As noted, the skyrocketing, yet conflicting, statistics of increased child pornography prosecution and punishment may indicate that raising the punishment more will not have the result that lawmakers intend. As they say, insanity is doing the same thing over and over again, expecting a different result.

¹¹⁴ *Cf. e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 15 (5th ed. 2009) (discussing the benefits of general and specific deterrence).

Section of the Department of Justice, thereby focusing energy on enforcing current laws, rather than enhancing them.¹¹⁵

Another potential reason for the apparent statistical jump in child pornography cases is the increased public awareness of the problem.¹¹⁶ As commentators have noted, child pornography seems to be the focus of a societal “moral panic” in today’s world.¹¹⁷ Therefore, it is possible that more cases are arising simply because the government and the people are more acutely aware of the problem. If this is the case, no changes in sentencing should be made. Though there are arguments for both reduction and increase in child pornography sentencing on the basis of deterrence,¹¹⁸ a conclusion regarding a change in the Sentencing Guidelines for *third-party offenders* is not appropriate given the multitude of unknown variables involved in successful deterrence.¹¹⁹

2. General Deterrence of SPCP Offenders

The media has attached itself to the “rise in sexting” across the United States.¹²⁰ A current national phenomenon, the sexting issue, and with it SPCP, has come to the forefront of the American conscience.¹²¹ According to one survey, 20% of all teenagers (under the age of eighteen) have sent or posted

¹¹⁵ See Ehrlich, *supra* note 88. As Michelle Meloy indicates, effective deterrence requires both punishment that exceeds the benefit of the crime, as well as a guarantee that such a punishment will be enforced. Meloy, *supra* note 105, at 213. The difficult part of this potentially helpful solution for the deterrence issue is where to get the funding; however, such a question is well outside the scope of this Note.

¹¹⁶ See, e.g., Basbaum, *supra* note 22, at 1292. Basbaum describes the “moral panic” that has caught the nation through the media, politicians, and other outlets that exceed the scope of the law and its function. *Id.* Though child pornography has always been at issue, the ever-decreasing limits of the Internet and the media attention Basbaum describes have shot child pornography, and its well-deserved loathing, into the public eye. It seems likely that the exploding and overwhelming public response to sexting stems from the very “moral panic” that Basbaum describes.

¹¹⁷ *Id.*; see also Hamilton, *supra* note 85, at 545.

¹¹⁸ For an argument for maintaining the sentencing requirements for child pornographers, see generally Rogers, *supra* note 84. For an argument for reexamining the sentencing requirements, see generally Exum, *supra* note 92.

¹¹⁹ These variables include factors such as successful enforcement, the benefit to the individual in committing the offense, whether the punishment of the crime exceeds the benefit to the individual in committing the offense, and whether that punishment is appropriate in juxtaposition to the harm caused to society. See Meloy, *supra* note 105, at 213.

¹²⁰ See, e.g., Alexis Huicochea & Kim Smith, ‘Sexting’ on Rise at Schools, ARIZ. DAILY STAR (Mar. 7, 2010, 12:00 AM), http://azstarnet.com/news/local/education/article_71d82f36-d62d-5101-961b-e7ff6d608bdd.html; Jocelyn Vena, MTV News’ ‘Sexting in America: When Privates Go Public’ Premieres on Valentine’s Day (Feb. 3, 2010, 11:16 AM), <http://www.mtv.com/news/articles/1631123/mtv-news-sexting-america-special-premieres-february-14.jhtml>.

¹²¹ See, e.g., *Sex and Tech*, *supra* note 24, at 1.

nude or semi-nude pictures or videos of themselves, all of which are technical violations of child pornography laws.¹²² As mentioned previously, it seems unlikely that teens are sending nude or semi-nude pictures of themselves with the distinct intent to produce and distribute child pornography. Further, this statistic overwhelmingly demonstrates that the current laws regarding child pornography as applied to SPCP are not having a deterrent effect on teens who engage in SPCP.

However, this does not mean that a rise in sentencing is appropriate. In an article out of Chicago, the teens interviewed regarding sexting, and with it SPCP, were apparently unaware that their actions constituted the production of child pornography.¹²³ This potential lack of awareness is the reason MTV, among others, is beginning to take action to increase awareness surrounding the dangers of sexting; however, even MTV is not taking the “child pornography is bad” approach.¹²⁴ Ultimately, the deterrent aspect of criminal penalties will likely weigh heavily on SPCP offenders—the key is creating awareness.

C. The Sentence Must Protect the Public from Further Crimes of the Defendant

The protection of the public is a key goal of sentencing; however, most individuals who produce SPCP do so for the benefit of one individual, not for the benefit of society as a whole.¹²⁵ Since this is the case, the current sentencing scheme espoused by the USSC is wholly ineffective in this department—most of the producers themselves never intended for other individuals to see the child pornography.¹²⁶ The particular goal of protecting the public through sentencing gives rise to another key distinction: those who produce SPCP for the benefit of one individual,¹²⁷ in comparison to those individuals who receive SPCP and

¹²² *Id.*

¹²³ La Risa Lynch, *New State Law Targets ‘Sexting’ Among Youth*, AUSTIN WEEKLY NEWS (June 10, 2009, 10:00 PM), <http://www.austinweeklynews.com/Main.asp?ArticleID=2282&SectionID=1&SubSectionID=1>. Throughout the entire interview process, with multiple teenagers at this high school, none of them mentioned that this was illegal, and certainly none drew the connection between sending a nude picture of oneself to a teenage boyfriend as the production of child pornography. *Id.*

¹²⁴ Vena, *supra* note 120.

¹²⁵ *See Sex and Tech*, *supra* note 24, at 2. Studies have shown that 71% of teen girls and 67% of teen boys indicated that they sent sexually explicit content to their boyfriend or girlfriend, and 21% of teen girls and 39% of teen boys indicated that they sent SPCP to individuals they wanted to date. *Id.* Neither of these factors revolve around a desire to produce child pornography for commercial benefit, but rather focus on one-on-one exchanges.

¹²⁶ *See id.*

¹²⁷ This group includes the majority of individuals who produce SPCP. *See id.*

proceed to distribute it,¹²⁸ whether it be for commercial gain or simple entertainment value.¹²⁹ Such a distinction will be addressed in Part V of this Note. However, as a whole, there is very little value in the sentencing mandated by section 2G2.2 in regards to SPCP under this particular goal of sentencing.

D. The Sentence Must Give the Defendant Needed Education and Correctional Treatment

SPCP offenders are children, plain and simple. Children, especially teenagers who make foolish and short-sighted decisions, are not going to obtain the education they need to correct and improve their behavior—and therefore correctly integrate with society—in a jail cell.¹³⁰ Rather, the focus of sentencing for SPCP needs to be based on education—explanations as to why what they are doing constitutes child pornography, what the dangers are surrounding child pornography, and the serious potential for significant time spent in prison if the behavior continues.¹³¹ However, one key issue regarding the rehabilitation of sex offenders in general, which is a major point of discussion regarding SPCP offenders, is sex offender registration.

Sex offender registration is a key component of sentencing in today's world. Notwithstanding, sex offender registration may be doing more harm than good: namely, the sex offender registration results in “social stigmatization, loss of relationships, employment, and housing, and both verbal and physical assaults.”¹³² These factors are key to a potential problem of rehabilitation: correctional treatment is the key phrase in this important sentencing guideline, designed to prevent recidivism through corrections; however, sex offender registration, and the “collateral damage” of the registration, may have the opposite effect.¹³³

¹²⁸ By the numbers, 92% of girls engage in sexting with a boyfriend or someone they want to date. *Id.* Therefore, a mere 8% engage in sexting for some ulterior motive, though that motive is not represented in the survey. *Id.*

¹²⁹ The difference is an individual who distributes throughout the school to embarrass the individual engaged in sexting for one's own personal entertainment, in comparison to an individual who engages in SPCP and proceeds to sell the product to third parties.

¹³⁰ Justin Brooks, *How Can We Sleep While the Beds Are Burning?: The Tumultuous Prison Culture of Attica Flourishes in American Prisons Twenty-Five Years Later*, 47 SYRACUSE L. REV. 159, 180 (1996) (“The strain on prison resources makes it necessary for prison staff to contend with not only larger populations, but more discontented populations. Space previously used for recreational and educational programs is converted into dormitories.”).

¹³¹ This approach has been used in other areas, most notably HIV prevention. David G. Ostrow, *AIDS Prevention Through Effective Education*, DAEDALUS, Summer 1989, at 229, 229 (“In the absence of a vaccine, alerting individuals to the risk of these behaviors has become the first line of defense in preventing further HIV infection and disease.”).

¹³² Richard Tewksbury, *Collateral Consequences of Sex Offender Registration*, 21 J. CONTEMP. CRIM. JUST. 67, 67 (2005).

¹³³ *Id.* at 74–79.

Another key problem is community rejection of individuals who are placed on sex offender registries. “[W]hen community members are notified of sex offenders’ presence in their communities, there are likely to be barriers erected to full and successful integration of such offenders into the community.”¹³⁴

Sex offender registration certainly has its benefits. It allows people to be put on notice of sex offenders in their community, which in turn allows people to protect themselves and their children in the case of potential recidivism by the individuals.¹³⁵ On the contrary, the dark side of sex offender registration, and an issue particularly relevant in cases of SPCP offenders, is that sex offender registration may push “sex offenders” into their own pariah community, resulting in sex offenders being unable to move on and appropriately reintegrate with society.¹³⁶ Forcing SPCP offenders onto a sex offender registration, though demonstrative of the severity of the offense, will not result in the successful education and rehabilitation of the individual.¹³⁷ To put these young individuals on a sex offender registration is to destroy potential future employment, educational possibilities, and a sense of community for little or no real gain, and to counter no real threat in the vast majority of cases.¹³⁸ Therefore, this Note calls for the complete abolition of sex offender registration for SPCP offenders.

As demonstrated above, the current sentencing scheme fails the goals of sentencing, espoused by the courts themselves. Given that the sentencing scheme fails, in many respects, for the child pornographers with which the original statute is intended to deal, it is difficult to imagine that such severe penalties would meet these same goals with respect to SPCP offenders.

¹³⁴ *Id.* at 68 (citing Richard G. Zevitz & Mary Ann Farkas, *Sex Offender Community Notification: Managing High Risk Criminals or Exacting Further Vengeance?*, 18 BEHAV. SCI. & L. 375, 380–90 (2000)).

¹³⁵ One particularly interesting application of this, which ultimately demonstrates the benefits in one neat package, is Family Watchdog. FAMILY WATCHDOG, <http://www.familywatchdog.us/> (last visited Dec. 22, 2011). Family Watchdog allows the user to enter his address, and then returns results which show the sex offenders in the user’s area. The user can then click on the various sex offenders that the website gives, and the website provides useful information such as age, address, work address, and prior convictions. *Id.*

¹³⁶ See, e.g., Meghan Silē Towers, *Protectionism, Punishment and Pariahs: Sex Offenders and Residence Restrictions*, 15 J.L. & POL’Y 291, 302–06 (2007) (discussing the residency restrictions that result in sex offenders being restricted to similar locations); Hollida Wakefield, *The Villification of Sex Offenders: Do Laws Targeting Sex Offenders Increase Recidivism and Sexual Violence?*, 1 J. SEXUAL OFFENDER CIV. COMMITMENT: SCI. & L. 141, 142 (2006) (questioning whether the ostracizing of sexual offenders leads to increased recidivism due to an inability to successfully rehabilitate).

¹³⁷ See Wakefield, *supra* note 136, at 142.

¹³⁸ See generally Phoebe Geer, *Justice Served? The High Cost of Juvenile Sex Offender Registration*, DEV. MENTAL HEALTH L., July 2008, at 33. For an interesting article on the constitutionality of sex offender registration as a whole, see generally Note, *Making Outcasts Out of Outlaws: The Unconstitutionality of Sex Offender Registration and Criminal Alien Detention*, 117 HARV. L. REV. 2731 (2004).

Therefore, it is necessary to introduce a new, more effective method of punishment *in regards to SPCP* offenders.

V. REFORMATION AND DISTINCTION: WHAT CHANGES NEED TO BE MADE REGARDING SPCP

The current Sentencing Guidelines for SPCP offenders, section 2G2.2, are both ineffective and extreme.¹³⁹ Some measures need to be taken to prevent SPCP from occurring and to educate children on the dangers and legal ramifications of their actions. To begin, a strong educational foundation is necessary for the effective prevention of SPCP. As soon as children are able to understand the ramifications of their actions, it is necessary to educate them on the wonders of modern technology and how those modern wonders can result in serious charges that could destroy their futures.

Further, the current *statutory* scheme needs to change. *Apprendi* makes the Sentencing Guidelines advisory, rather than mandatory; therefore, the law as it stands right now requires that true limitations to judicial discretion be created statutorily rather than through amendment to the guidelines.¹⁴⁰ Therefore, proposing change solely to the Sentencing Guidelines themselves will grant little security to SPCP offenders.¹⁴¹ Instead, a Model Statute,¹⁴² with mandatory sentencing requirements, is recommended. The recommended Model Statute below is broken up into its four subsections, with each section's analysis provided immediately thereafter.¹⁴³

A. *The Model Statute: Introduction to 18 U.S.C. § 2252A*

In order to successfully protect the minors who engage in SPCP from long-term, life-destroying consequences, we need to significantly alter the application and subsequent punishments available under the current code.¹⁴⁴ Under the current child pornography statute, 18 U.S.C. § 2252,¹⁴⁵ individuals

¹³⁹ See *supra* Parts III–IV.

¹⁴⁰ See *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000).

¹⁴¹ *Id.* Ultimately, *Apprendi* stands for the concept that the judiciary is free to move away from the federal Sentencing Guidelines to more severe penalties, which is the exact discretion that needs to be limited to protect SPCP offenders.

¹⁴² This statute is meant for the federal code; however, it would be equally applicable, and it is equally recommended, to state legislatures.

¹⁴³ To view the Model Statute in its entirety, see *infra* Appendix.

¹⁴⁴ The Model Statute excludes the Commerce Clause requirements for criminal statutes that are typically dealt with in the U.S. Code—this is to emphasize the applicability of the statute to both state and federal legislatures. Congress would need to justify the criminal statute under the Commerce Clause in order to proceed, and the language presented in 18 U.S.C. § 2252(a)(1) would more than suffice.

¹⁴⁵ The text of the statute is as follows:

[Any individual who] knowingly receives, or distributes, any visual depiction using any

who produce, distribute, or possess depictions of children engaged in sexually explicit conduct are in violation of the federal child pornography laws. The current law is expansive, as the text of the statute indicates.¹⁴⁶ In one sense, this is a good thing: the broad language of the statute allows the government to prosecute individuals under the statute effectively.¹⁴⁷ However, the statute, by its plain language, also applies to individuals who engage in SPCP; there is no distinction between individuals who produce child pornography themselves versus individuals who produce child pornography as third parties. It is this failed distinction that needs to be remedied in order to appropriately adjust to the current SPCP problems.

As mentioned above, in order to successfully prohibit the imposition of the weight of § 2252 on SPCP offenders, Congress must distinguish them from other child pornography offenders statutorily, as well as in the Sentencing Guidelines.¹⁴⁸ The most effective way to do this is to make a simple addition to the statute, which could appropriately be called 18 U.S.C. § 2252A.

B. Subsection (a) of 18 U.S.C. § 2252A

1. The Text of 18 U.S.C. § 2252A(a)

In § 2252A, the following provisions would be made:

§ 2252A—Self-Exploitation of a Minor

- a) Any individual *who is deemed a minor at the time of the offense* who:
- 1) *produces*, knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign

means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct

18 U.S.C. § 2252(a)(2) (2006 & Supp. III 2008).

¹⁴⁶ “[Any individual who] knowingly receives, or distributes, any visual depiction using any means . . . if— (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct” *Id.*

¹⁴⁷ Child pornography made up 69% of the sex exploitation offenses referred to U.S. Attorneys in 2006. MOTIVANS & KYCKELHAHN, *supra* note 108, at 1. The total number of child pornography cases referred to the Department of Justice was 2539, up from a mere 169 in 1994. *Id.*

¹⁴⁸ Once again, this is because of *Apprendi*’s determination that the Sentencing Guidelines are advisory, rather than mandatory. *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000).

commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if—

- i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
- ii) such visual depiction is of such conduct
 - is guilty of a misdemeanor for a first offense and shall be punished as provided in subsection (b) of this section.
 - is guilty of a felony if this is the second or further offense and shall be punished as provided in subsection (b)(6) of this section.

2. *Explanation of the Criminal Conduct Required by 18 U.S.C. § 2252A(a)*

The substantive changes made in subsection (a) of the Model Statute are perhaps the most important changes needed. It is subsection (a) that establishes SPCP as a completely separate criminal offense, which takes SPCP offenders outside of the realm of the current child pornography statutes, unless the statute maintains otherwise for punishment purposes. The approach of distinguishing SPCP offenders from the third-party offenders has found considerable support in the states. Currently, six states¹⁴⁹ have passed legislation distinguishing SPCP from child pornography; however, the federal government has yet to follow suit. Ultimately, the Model Statute could also apply to the states: it is reasonable to expect that, in most circumstances, SPCP producers and offenders will be keeping their transmissions within state lines.¹⁵⁰ There are, of course, states that have either refused to distinguish SPCP offenders from third-party offenders, or states that have refused to criminalize sexting.¹⁵¹ Now that the statute specifically categorizes SPCP offenders under a separate section than third-party adult offenders, the statute may appropriately address the punishment concerns.

¹⁴⁹ States that have passed SPCP legislation include: Arizona, California, Connecticut, Illinois, Louisiana, and Rhode Island. States that are currently deliberating over bills regarding the distinction between child pornography and sexting include: Georgia, New Jersey, New York, Ohio, Pennsylvania, and South Carolina. Finally, states that proposed sexting legislation but where such legislation failed, include: Florida, Indiana, Kentucky, Mississippi, Oklahoma, and Rhode Island. See *2010 Legislation Related to Sexting*, *supra* note 28.

¹⁵⁰ See MOTIVANS & KYCKELHAHN, *supra* note 108, at 1.

¹⁵¹ See *2010 Legislation Related to Sexting*, *supra* note 28.

C. Subsection (b) of 18 U.S.C. § 2252A

1. The Text of 18 U.S.C. § 2252A(b)

b) Any individual who is guilty of Self-Exploitation of a minor under this statute shall be subject to the following penalties for *first offenses*:

1) If the individual is guilty of *production* of visual depictions involving the use of a minor engaged in sexually explicit conduct, *and* that individual distributes the materials for commercial gain, *or* distributes that material to more than *one* individual then that individual is subject to the education program detailed in subsection (c) *and all* of the following penalties:

- i) A maximum of \$5,000 fine;
- ii) Community service of up to 300 hours;
- iii) Incarceration not exceeding 360 days; and
- iv) Restriction of use of electronic devices, including but not limited to computers, cell phones, and other communication devices, as needed for a period not exceeding three years.

However, such individual *shall not* be subject to any form of sex offender registration requirements.

2) If the individual is guilty of *production* of visual depictions involving the use of a minor engaged in sexually explicit conduct, *and* that individual distributes the material to *one* other individual, then that individual is subject to the education program outlined in subsection (c) of this section, *and* any of the following penalties:

- i) A maximum of \$1,000 fine;
- ii) Community service of up to 100 hours;
- iii) Restriction of use of electronic devices, including but not limited to computers, cell phones, and other communication devices, as needed for a period not exceeding three years.

Specifically, such individual *shall not* be subjected to any form of sex offender registration requirements.

3) If the individual is guilty of *possession* of visual depictions involving the use of a minor engaged in sexually explicit conduct, *and* that individual distributes such materials to other individuals, then that individual is subject to the education program detailed in subsection (c) *and all* of the following penalties:

- i) A maximum of \$5,000 fine;
- ii) Community service of up to 300 hours;
- iii) Incarceration not exceeding 360 days; and
- iv) Restriction of use of electronic devices, including but not limited to computers, cell phones, and other communication devices, as needed for a period not exceeding three years.

However, such individual *shall not* be subject to any form of sex offender registration requirements.

4) If the individual is guilty of *distribution* of visual depictions involving the use of a minor engaged in sexually explicit conduct, *and* that individual distributes such materials to other individuals *for commercial gain*, then that individual is subject to the educational program detailed in subsection (c) *and all* of the following penalties:

- i) A maximum of \$5,000 fine;
- ii) Community service of up to 300 hours;
- iii) Incarceration not exceeding 360 days; and
- iv) Restriction of use of electronic devices, including but not limited to computers, cell phones, and other communication devices, as needed for a period not exceeding three years.

However, such individual *shall not* be subject to any form of sex offender registration requirements.

5) If the individual is guilty of *possession* of visual depictions involving the use of a minor engaged in sexually explicit conduct, then that individual is subject to the education program outlined in subsection (c) of this section.

6) Individuals who are guilty of *two or more offenses*, prosecuted consecutively, *shall* be subject to the penalties presented in 18 U.S.C. § 2252(b)(1).

2. Analysis of the Model Statute's Punishment System in Subsection (b)

The Model Statute presents a much more complex and detailed sentencing scheme than the current § 2252 in order to appropriately distinguish among different forms of harm and culpability. While the Model Statute proceeds with general punishments, such as the educational requirement, there are specified punishments for specific types of offenders, which will be discussed in the order that they are presented.

a. Producers

Subsections (b)(1) and (2) deal with individuals who are guilty of the production and distribution of SPCP. Specifically, the statute imposes much harsher penalties for individuals who proceed in an attempt to benefit commercially from SPCP, or widely distribute SPCP, as opposed to those individuals who engage in SPCP for personal, romantic, or other reasons. Essentially, the basis for this differentiation is the harm to the public. If the offending child distributed the sexually explicit materials to one individual, rather than the public as a whole (in layman's terms, not legal), then the appropriate sentence should change to match the harm to the public.

Naturally, this differentiation exposes the court to the potential lying child, who claims to have intended to share the SPCP with one individual, when in fact the intent was to share with multiple individuals. However, this exposure is

limited. If a child producing SPCP posts that SPCP to the Internet, or sends a mass picture or video message to multiple individuals via their cell phone, then the court will recognize that the child intended (and successfully distributed to) a larger audience. Since exposure to multiple individuals increases the public harm, the punishment should likewise increase.

As to the punishment itself, SPCP producers should not be subjected to incarceration unless they intended to distribute the SPCP to multiple individuals, as this type of distribution is indicative of a more criminally culpable state of mind than distribution to one individual (such as a boyfriend). The Model Statute further emphasizes this appropriate state of mind—which is an intent to exploit oneself to the harm of society, if the distribution is for commercial purposes—as this demonstrates self-exploitation for commercial gain. However, the Model Statute seeks to allow SPCP offenders, even those who offend in the most egregious manner, to have the opportunity in the case of first-time offenses to successfully reintegrate into society, and seeks to remove as many hindrances to such successful integration as possible. Thus, the statute specifically prohibits sex offender registration for first-time offenses, and declares the penalty to be a misdemeanor on the first offense. The Model Statute also indicates that courts should advocate a different rehabilitative approach: denial of access to computers and cell phones for a prescribed period, an educational program, and potentially fines and community service.¹⁵²

b. *Non-Producers Who Distribute and Possess*¹⁵³

As demonstrated by statistics,¹⁵⁴ SPCP is generally intended for one individual, and is subsequently spread out beyond that individual to other individuals. The Model Statute seeks to quickly end that exposure; therefore, the Model Statute recommends that individuals who receive SPCP, regardless of their status, be immediately required to erase that image. As the reader should note in subsection (d) of the statute, individuals who comply with the mandate have an affirmative defense to possession; though they were in possession of SPCP, they should not be prosecuted (and if they are, they have an easy defense). Should that individual proceed to distribute that image, even

¹⁵² For an excellent discussion on the constitutionality of restricting computer access to prevent recidivism, see generally Gabriel Gillett, *A World Without Internet: A New Framework for Analyzing a Supervised Release Condition that Restricts Computer and Internet Access*, 79 FORDHAM L. REV. 217 (2010). Gillett notes that the Third Circuit expressly approved of this approach, stating that “the condition” was “clearly and properly imposed . . . to deter future crimes via the [I]nternet and to protect children.” *Id.* at 220 (quoting *United States v. Thielemann*, 575 F.3d 265, 278 (3d Cir. 2009)). There is clear support for this approach in the courts. See generally *id.*

¹⁵³ The recommendations made in this Note as to recipient distributors apply to minors. Adults who receive SPCP, and engage in the same conduct as the minors presented here, should be subjected to the full weight of 18 U.S.C. § 2252 and USSG § 2G2.2.

¹⁵⁴ See *supra* Part IV.

through a mass e-mail or text message to their friends, those individuals should be subjected to the same penalties as the SPCP producer who distributes to multiple individuals. Once again, the Model Statute seeks to maximize the ability of the SPCP offender to successfully reintegrate into society by avoiding sex offender registration and declaring the offense a misdemeanor.

The issue of distribution to a wide audience for non-commercial purposes is a troubling one. On the one hand, the damage to society is significant—instead of one individual witnessing SPCP, multiple individuals do. One can easily imagine a multitude of reasons for doing so, mainly revolving around either excitement as to the physical attraction of the individual in the image, or to embarrass or humiliate the individual who produced SPCP. However, the Model Statute draws a line at the wide dissemination of SPCP based on the Supreme Court's decision in *Ferber*, which stresses the need to reduce the market for child pornography.¹⁵⁵ Individuals who widely distribute SPCP, whether producers or individuals who were the intended recipients of SPCP, should face the most severe penalties. Therefore, the Model Statute, in recognition of that distinction, draws the line regarding incarceration at that point.

c. *Possessors*

Minor individuals who do not distribute SPCP, but receive and maintain possession of SPCP, are still governed by another set of rules. These individuals, as adult child pornography possessors, maintain a lesser degree of culpability.¹⁵⁶ The Model Statute recommends a light sentence for these individuals; the goal for these individuals is to simply educate them on why it is impermissible to maintain possession of such materials, and inform them of the consequences of doing so after the age of majority. Thus, these individuals should be subjected to alternative forms of punishment commonly used with child offenders of other crimes¹⁵⁷: confiscation of the SPCP, community service, and a diversion program intended to inform the individual of the severity of the crime and the ramifications should he continue such conduct at

¹⁵⁵ *New York v. Ferber*, 458 U.S. 747, 759 (1982).

¹⁵⁶ This notion comes from the Court's decision in *Ferber*, in which the actual sexual abuse of children is a key point in the criminalization of child pornography, defeating the First Amendment right to produce such material. *Id.* The lesser degree of culpability stems from the fact that while possessors do encourage or consume images related to this sexual abuse, they do not actually sexually abuse children themselves. Of course, this does not mean that possession of child pornography is suddenly acceptable, or even more acceptable given this information. It only means that it is slightly less heinous to possess child pornography than to actually sexually abuse a child on camera.

¹⁵⁷ For example, a common juvenile punishment for theft is diversion, and courts may use the diversion program to educate juveniles about the crime they committed without actually plaguing their record. *See, e.g., Family Assessment*, FRANKLIN COUNTY COURT OF COMMON PLEAS: DIVISION OF DOMESTIC REL. JUV. BRANCH, <http://www.fccourts.org/drj/juvint.html> (last visited Feb. 9, 2011).

the age of majority.¹⁵⁸ These individuals have caused the smallest amount of damage possible in a case of child pornography: the producer was the other child, who did so voluntarily, the individual who received the SPCP did not distribute the image, and finally the major harm was that the individual retained the image. This individual, currently, would be punished under 18 U.S.C. § 2252(b)(1) and subjected to section 2G2.2 of the Sentencing Guidelines. The Model Statute seeks to drastically increase the protection of these individuals, given their limited culpability and the minimization of the harm to society.

D. Subsection (c) of 18 U.S.C. § 2252A

Subsection (c) focuses on the education program to be provided to SPCP offenders. Subsection (1) below contains the text of the proposed statute, with the analysis immediately following.

1. The Text of 18 U.S.C. § 2252A(c)

c) EDUCATIONAL PROGRAM.—Individuals who are convicted under this statute shall be subjected to an educational program to be created by the United States Department of Justice, which will address the dangers of self-exploitation and the consequences of such action upon the age of majority, among other factors deemed necessary by said agency.

2. The Education Program of Subsection (c)

The Model Statute seeks to educate individuals on the consequences of their actions, and only to punish with incarceration those individuals who have significantly harmed society and demonstrated a complete disregard for that harm through wide dissemination and potentially commercial gain. For most offenders, the educational program is meant to simply scare them: to illustrate the consequences of their actions at the age of majority and to inform them of the dangers of sending these images to others. What specifically should be included in this educational program is outside the scope of this Note, and certainly outside the expertise of the author—therefore, the Model Statute, in accordance with making the educational requirements as effective as possible, delegates the creation of the educational program to those agencies that are most familiar with the effects of child pornography on today's society.

E. Subsection (d) of 18 U.S.C. § 2252A

The text in subsection (1) of this section contains the text of the proposed statute, with the analysis immediately following.

¹⁵⁸ *Id.*

1. *The Text of 18 U.S.C. § 2252A(d)*

d) AFFIRMATIVE DEFENSES.—

1) Any individual who is guilty of the offenses described in subsection (a) of this section shall have an affirmative defense to conviction under such subsection if:

- i) the individual would be guilty under the *possession* component of subsection (a), *and*
- ii) that individual both immediately destroys said materials and reports receipt of said materials to the appropriate enforcement authorities.

2) Any individual who is guilty of the offenses described in subsection (a) of this section shall have an affirmative defense to conviction under such subsection if:

- i) the individual would be guilty under the *production* component of subsection (a), *and*
- ii) that individual did not distribute such materials to *any other individual*.

2. *The Affirmative Defenses of Subsection (d)*

Subsection (d) presents two affirmative defenses: a defense for the individual who possesses SPCP, but destroys the image and reports the incident to the appropriate authorities, and the unique circumstance of the producer who does not distribute. Since we have already discussed the individual who destroys the image,¹⁵⁹ our focus here is on the producer who does not distribute.

Ultimately, the SPCP producer who does not distribute the image has imposed absolutely no harm on society: the image is simply one that the producer wanted to have for whatever reason. However, the statutory system would technically subject that individual to possession charges. To avoid this rather absurd result, the Model Statute simply creates an affirmative defense to that charge. However, this defense is more important in one key respect: it prevents a SPCP producer, who meant to keep the image to himself, from being criminally culpable in the event that such materials were *stolen from his possession*. In this circumstance, the producer would not be criminally culpable due to the affirmative defense; however, the thief would be guilty under the same section.

¹⁵⁹ See *supra* Part V.C.2.b.

F. Application of the Model Statute 18 U.S.C. § 2252A to Adam and Betsy

To demonstrate the dramatic difference between the Model Statute and the current statute, application of the Model Statute is appropriate.¹⁶⁰ Once again, the facts are as follows: Adam, a sixteen-year-old boy who recently moved to Michigan, takes a picture of his genitals and sends it through e-mail to his fifteen-year-old girlfriend Betsy, who lives in Ohio. Adam's motivation was personal in nature—he wanted Betsy to come and visit him on the weekend and thought that a sexual advance might accomplish that goal. Betsy's father finds the picture and reports Adam to the police. Since Adam is under the age of eighteen, he is in violation of the federal child pornography laws.

Under the Model Statute, Adam would be guilty of the offenses listed in subsection (a), and therefore subject to the punishments of subsection (b). Most notably, because Adam is a first-time offender, he is only guilty of a *misdemeanor*, not a *felony*.¹⁶¹ To determine what sentencing scheme Adam falls under, we simply need to look at the facts as they are presented. Adam produced SPCP, and he distributed that SPCP to one individual. Therefore, Adam falls under 18 U.S.C. § 2252A(b)(2), which requires a maximum \$1,000 fine, up to 100 hours of community service, and attendance of the education program of subsection (c).¹⁶² In addition, Adam is subject to various restrictions of his access to electronic devices, as determined by judicial discretion.¹⁶³ Finally, Adam *will not be subjected to a sex offender registry*.¹⁶⁴

Betsy is facing conviction under subsection (a) as well, for *possession*. Betsy did not immediately report the image to appropriate authorities, and, therefore, she does not receive the affirmative defense listed in subsection (d).¹⁶⁵ However, Betsy did not distribute the SPCP, and is also a first-time offender. Therefore, Betsy is subject to the punishments articulated in subsection (b). Betsy falls under the *possession* class of subsection (b)(5) and is therefore subject solely to the educational program described in subsection (c).¹⁶⁶

VI. CONCLUSION

Over the course of this Note, one can readily discern that there is a substantial need for legal adaptation to the new society that we live in. No one questions that child pornography is a heinous concept or that we need to eliminate it as much as possible. However, we do so for the benefit of the next

¹⁶⁰ For the application of the current statutory scheme, see *supra* Part III.B.

¹⁶¹ See *supra* Part V.B.1.

¹⁶² See *supra* Parts V.C.1, V.D.

¹⁶³ See *supra* Part V.C.1.

¹⁶⁴ *Id.*

¹⁶⁵ See *supra* Part V.E.1.

¹⁶⁶ See *supra* Parts V.C.1, V.D.

generation—to protect those individuals who come after us. By subjecting those very individuals to the punishments of those who abuse children, we are perverting the goals of our system and potentially destroying the productivity and potential of young lives. The purpose of this Note is to bring attention to that possibility: I am not suggesting that this *is happening*, but rather that it *could*. This Note seeks to bring one's attention not only to the damage that could be done to these individuals, but also to question whether the current sentencing scheme is really effective. Ultimately, I seek to introduce this adaptation through the Model Statute presented in Part V of this Note. I do not purport to say that this is the infallible statute and that there is no possible way to create a better, more effective one. However, it is demonstrative of the change that needs to be made, and this Note calls on all lawmakers, both in Congress and the state legislatures, to take action and clarify the blurring line between offender and victim.

APPENDIX: THE FULL TEXT OF THE MODEL STATUTE, TENTATIVELY
NAMED 18 U.S.C. § 2252A

Provided below is the full, uninterrupted text of the Model Statute, to demonstrate what the statute will look like put together.

§ 2252A—Self-Exploitation of a Minor

a) Any individual *who is deemed a minor at the time of the offense* who:

1) *produces*, knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if—

i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

ii) such visual depiction is of such conduct

—is guilty of a misdemeanor for a first offense and shall be punished as provided in subsection (b) of this section.

—is guilty of a felony if this is the second or further offense and shall be punished as provided in subsection (b)(6) of this section.

b) Any individual who is guilty of Self-Exploitation of a minor under this statute shall be subject to the following penalties for *first offenses*:

1) If the individual is guilty of *production* of visual depictions involving the use of a minor engaged in sexually explicit conduct, *and* that individual distributes the materials for commercial gain, *or* distributes that material to more than *one* individual then that individual is subject to the education program detailed in subsection (c) *and all* of the following penalties:

i) A maximum of \$5,000 fine;

ii) Community service of up to 300 hours;

iii) Incarceration not exceeding 360 days; and

iv) Restriction of use of electronic devices, including but not limited to computers, cell phones, and other communication devices, as needed for a period not exceeding three years.

However, such individual *shall not* be subject to any form of sex offender registration requirements.

2) If the individual is guilty of *production* of visual depictions involving the use of a minor engaged in sexually explicit conduct, *and* that individual distributes the material to *one* other individual, then that individual is subject to the education program outlined in subsection (c) of this section, *and any* of the following penalties:

- i) A maximum of \$1,000 fine;
- ii) Community service of up to 100 hours;
- iii) Restriction of use of electronic devices, including but not limited to computers, cell phones, and other communication devices, as needed for a period not exceeding three years.

Specifically, such individual *shall not* be subjected to any form of sex offender registration requirements.

3) If the individual is guilty of *possession* of visual depictions involving the use of a minor engaged in sexually explicit conduct, *and* that individual distributes such materials to other individuals, then that individual is subject to the education program detailed in subsection (c) *and all* of the following penalties:

- i) A maximum of \$5,000 fine;
- ii) Community service of up to 300 hours;
- iii) Incarceration not exceeding 360 days; and
- iv) Restriction of use of electronic devices, including but not limited to computers, cell phones, and other communication devices, as needed for a period not exceeding three years.

However, such individual *shall not* be subject to any form of sex offender registration requirements.

4) If the individual is guilty of *distribution* of visual depictions involving the use of a minor engaged in sexually explicit conduct, *and* that individual distributes such materials to other individuals *for commercial gain*, then that individual is subject to the educational program detailed in subsection (c) *and all* of the following penalties:

- i) A maximum of \$5,000 fine;
- ii) Community service of up to 300 hours;
- iii) Incarceration not exceeding 360 days; and
- iv) Restriction of use of electronic devices, including but not limited to computers, cell phones, and other communication devices, as needed for a period not exceeding three years.

However, such individual *shall not* be subject to any form of sex offender registration requirements.

5) If the individual is guilty of *possession* of visual depictions involving the use of a minor engaged in sexually explicit conduct, then that individual is subject to the education program outlined in subsection (c) of this section.

6) Individuals who are guilty of *two or more offenses*, prosecuted consecutively, *shall* be subject to the penalties presented in 18 U.S.C. § 2252(b)(1).

c) EDUCATIONAL PROGRAM.—Individuals who are convicted under this statute shall be subjected to an educational program to be created by the United States Department of Justice, and which will address the dangers of

self-exploitation and the consequences of such action upon the age of majority, among other factors deemed necessary by said agency.

d) AFFIRMATIVE DEFENSES.—

1) Any individual who is guilty of the offenses described in subsection (a)

of this section shall have an affirmative defense to conviction under such subsection if:

i) the individual would be guilty under the *possession* component of subsection (a), *and*

ii) that individual both immediately destroys said materials and reports receipt of said materials to the appropriate enforcement authorities.

2) Any individual who is guilty of the offenses described in subsection (a) of this section shall have an affirmative defense to conviction under such subsection if:

i) the individual would be guilty under the *production* component of subsection (a), *and*

ii) that individual did not distribute such materials to *any other individual*.